

Jones Act Battles, Administrative Appointees on the Move, and Combative Hearings Shape the Landscape

This edition of the Cozen O'Connor Maritime and Infrastructure Federal Update discusses (i) the Jones Act conflict developing before Customs and Border Protection with respect to the use of foreign flag vessels to perform work on the U.S. Outer Continental Shelf, (ii) the implementation of a significant terminal coordination agreement, (iii) leadership changes at the Department of Transportation and Federal Maritime Commission, (iv) settlement of a landmark Jones Act case, (v) House actions regarding Metropolitan Planning Organizations and the Coast Guard and (vi) Congressional hearings on Coast Guard, maritime, and infrastructure programs.

Regulatory and Administrative

Tensions Rise over CBP's Vessel Equipment Letter Rulings

As reported last month, on January 18, Customs and Border Protection (CBP) published a proposal to modify or revoke more than 20 ruling letters to clarify the intersection of "merchandise" and "vessel equipment" under the Jones Act, as informed by Treasury Decision 49815(4). The proposed modification would limit "vessel equipment" to "portable articles necessary and appropriate for the navigation, operation, or maintenance of the vessel and for the comfort and safety of the persons on board," extending Jones Act coastwise trade requirements to many previously excluded items, including repair materials, pipeline connectors, and damaged pipe removed from the seabed.

CBP extended the public comment deadline to April 18, with the possibility of further extensions. Advocates for both sides have been extremely vocal, with the American Maritime Partnership (AMP), Shipbuilders Council of America (SCA), and Offshore Marine Service Association (OMSA) praising CBP and asserting that the proposal would restore more than 3,200 jobs to the offshore market. AMP, SCA, and OMSA have been joined by 33 members of the House of Representatives and 10 Senators, who have submitted letters of support to CBP. In opposition, members of the oil and gas industry have asserted that the proposal would lead to a decrease in spending on oil and natural gas development in the Gulf of Mexico in the range of \$5.4 billion per year, with a resulting loss of 80,000 jobs through 2030, due to the inability to use foreign flag subsea construction, reel lay, and heavy lift vessels in the development of U.S. offshore oil and natural gas projects.

Port Coordination Agreement Goes into Effect

The Federal Maritime Commission (FMC) voted to allow the East Coast Gateway Terminal Agreement between the port authorities of Georgia and Virginia to go into effect. Under the agreement, which became effective on April 10, the port authorities may discuss and exchange information on marketing materials, commercial opportunities (including operational efficiencies and cost reductions), joint or independent acquisition and utilization of operating systems and equipment, and cargo handling terms and practices. In addition, the agreement allows the port authorities to act as a single entity in the exchange of information and performance criteria with carriers, shippers, and marine terminal operators; however, the agreement does not allow the port authorities to jointly negotiate, set, and approve terminal rates or charges.

Key DOT Nominations and Appointments

On April 6, President Trump nominated Derek Kan to serve as the Department of Transportation's (DOT) undersecretary for policy. Kan currently is a general manager for the ridesharing company Lyft and is a member of Amtrak's board of directors. He previously worked as an aide to Senator Mitch McConnell and as chief economist for the Senate Republican Policy Committee.



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Secretary of Transportation Elaine Chao selected Marty Fiorentino to serve as her senior adviser on ports. Fiorentino has worked with CSX Corporation, the Seaboard System Railroad, and the Jacksonville Port Authority. He has also served as chief of staff for the Federal Railroad Administration and as counselor to the deputy secretary of Transportation during the George H.W. Bush administration. Fiorentino is the president of the Fiorentino Group, a Florida-based government affairs firm specializing in maritime and infrastructure issues.

Cordero to Depart the FMC

Former Federal Maritime Commission chairman and current commissioner, Mario Cordero, will be departing the FMC on May 12, after Port of Long Beach Board of Harbor Commissioners selected Commissioner Cordero as the port's new executive director. Commissioner Cordero served as the FMC's chairman from April 2013 until January 2017, when he was replaced under the new administration by Acting Chairman Michael Khouri.

Senate Commerce Committee Advances Nominee for Deputy DOT Secretary

The Senate Committee on Commerce, Science, and Transportation voted 15-12 along party lines to approve Jeffrey Rosen's nomination for deputy secretary of Transportation. Opposition to Rosen's nomination questioned his commitment to safety regulations and the extent to which Rosen would recuse himself from matters related to previous transportation industry clients. His nomination awaits consideration by the full Senate.

Furie and DHS Settle Jones Act Dispute

As previously reported, on March 24, Furie Operating Alaska, LLC and the Department of Homeland Security (DHS) jointly filed a Stipulation of Dismissal in the U.S. District Court for the District of Alaska, ending their long-standing Jones Act dispute. The dispute arose out of Furie's transportation of a jack-up rig from the Gulf of Mexico to Cook Inlet, Alaska, in March 2011. A portion of the transportation was performed by a foreign-flag, heavy-lift vessel instead of a coastwise-qualified U.S.-flag vessel. Prior to the move, Furie had not received a DHS-issued Jones Act waiver. DHS, acting through Customs and Border Protection, assessed a \$15 million penalty against Furie, prompting Furie to file suit. Details of the settlement have not been released.

Legislative

House Committee Approves Metropolitan Planning Organization, Coast Guard Bills

On March 29, the House Transportation and Infrastructure Committee approved Representative Daniel Lipinski's (D-Ill.) H.R. 1346 by voice vote. The bill would repeal a 2016 Federal Highway Administration and Federal Transit Administration rule that requires Metropolitan Planning Organizations (MPOs) in the same urban area to adjust their boundaries, merge, or otherwise develop a single metropolitan transportation plan and joint performance targets. The Senate passed a companion bill, S. 496, by unanimous consent in early March.

During the same markup session, the committee approved Representative Duncan Hunter's (R-Calif.) bill, H.R. 1726, to reorganize portions of Title 14 of the U.S. Code related to the Coast Guard. The bill's provisions may assist in moving the Coast Guard to the Department of Defense, which Rep. Hunter urged in his March 16 letter to the president and repeated during recent hearings.

House Subcommittee Holds Maritime Program Reauthorization Hearing

The House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Maritime Transportation held a reauthorization hearing on April 4 that brought together officials from the Coast Guard, the Federal Maritime Commission, and the Maritime Administration (MARAD).

Full committee Ranking Member Peter DeFazio (D-Ore.), backed up by subcommittee Chairman Duncan Hunter (R-Calif.), engaged in a heated debate with FMC Acting Chairman Michael Khouri regarding the FMC's oversight of the Shipping Act's antitrust immunities. Rep. DeFazio suggested

that Congress “re-address” the antitrust immunity that has been granted under the Shipping Act.

The panel additionally discussed potential solutions to address perceived shortfalls in the government’s sealift capabilities. MARAD Executive Director Joel Szabat suggested expanding the Maritime Security (MSP) or creating a MSP-like program to address shortfalls in available vessels and, in particular, mariners, to meet U.S Transportation Command requirements. He also suggested implementing trade policies that increase the use of U.S.-flag vessels to address the mariner shortage. This initiative is supported by Representative John Garamendi (D-Calif.), as evidenced by his bill, H.R. 1240, that would require the use of U.S.-flag vessels to carry a percentage of LNG and crude oil exports.

Transportation Committee Discusses FAST Act Implementation

The House Committee on Transportation and Infrastructure’s Subcommittee on Highways and Transit held a hearing on state and local perspectives on implementing the Fixing America’s Surface Transportation (FAST) Act on April 5. The FAST Act, signed into law in December 2015, authorizes \$305 billion in transportation infrastructure investment through fiscal year 2020.

During the hearing, Republican committee members advocated for overhauling the permitting process for infrastructure construction projects. Democrats such as committee Ranking Member Peter DeFazio (D-Ore.) disagreed, arguing that permitting regulations only slow down work on a small number of projects; they instead advocated for focusing on infrastructure funding. Rep. DeFazio further criticized Secretary of Transportation Elaine Chao for using “alternative facts” in her recent claim that federal regulations are the largest barrier to infrastructure improvement projects.

Please contact Robert Freeman, Government Relations Principal of Cozen O'Connor Public Strategies or Jeff Vogel in the firm's Maritime Regulatory practice with any questions you may have regarding this update.

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